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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 1017.

THE INTERLAKE STEAMSHIP COMPANY,
Petitioner,

v.

MARCELLA R. NIELSEN and STEPHEN O'HEARNE,
Deputy Commissioner,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT, MARCELLA R. NIELSEN, IN OPPOSITION.

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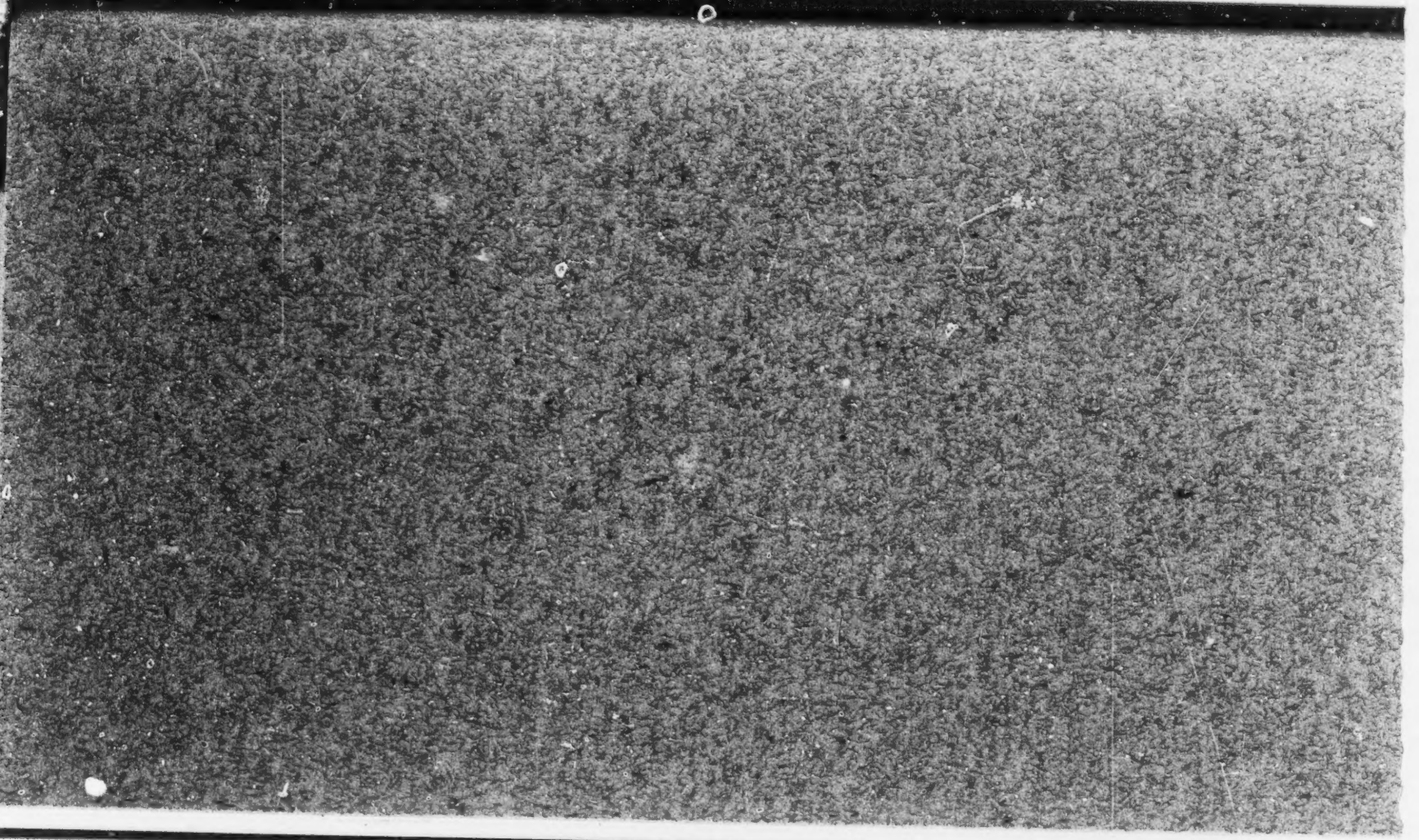

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OPINIONS BELOW.

The opinion of the Court of Appeals (Pet. App. 17-23) is reported at 338 F. 2d 879.

The opinion of the District Court (Pet. App. 8-16) and the findings and the award of the Deputy Commissioner (Pet. App. 2-7) are unreported.

This brief of respondent, Marcella R. Nielsen, in opposition to the petition for writ of certiorari, is filed within the time enlarged by the Clerk under Paragraph 5 of Rule 34.

JURISDICTION.

The judgments of the Court of Appeals were entered on December 3, 1964. (Pet. App. 24-25.) A timely petition for rehearing was denied on January 12, 1965. (Pet. App. 25.)

The petition for writ of certiorari was filed on March 25, 1965.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

STATEMENT OF QUESTION PRESENTED FOR REVIEW.

An award of death benefits was made by the Deputy Commissioner under the Longshoremen's Act, co-respondent herein, to the widow and the two minor children of Carl O. Nielsen, a maritime worker, who was fatally injured in the course of his employment on January 11, 1959, from the impact of the top of his automobile, which he was using in the performance of his maritime duties, upon the frozen waters of Maumee Bay, where his vessel, the S. S. Arcturus, was berthed for the winter.

The deceased suffered no injury whatsoever, while the car was on the dock and the fatal injury *first* occurred, *after* the vessel left the dock and struck, upside down, on the frozen waters below the dock.

The single, narrow question of law here sought to be reviewed on petition for a writ for certiorari is whether, on the undisputed facts thus found by the Deputy Commissioner from evidence in a voluminous record before him, and, accepted by both lower courts, the fatal injury suffered *in fact* from the impact of the car on the ice below the dock, was an "injury occurring upon the navigable waters of the United States," within the legal meaning of those words, as found in the Longshoremen's Act.

STATEMENT OF THE CASE.

The decisive facts found by the Deputy Commissioner are not in controversy. They were accepted as true by both lower courts.

The S. S. Arcturus was berthed for the winter of 1959 at a dock on Maumee Bay on Lake Erie.

Nielsen was regularly employed as a shipkeeper by petitioner, The Interlake Steamship Company, of certain vessels owned by it, during the closed season of navigation on the Great Lakes. It happened that he had also been regularly employed by the same vessel owner, as licensed engineer on its vessels, during the open season of navigation on the Great Lakes. In a word, he was a maritime worker in the fullest sense of that term.

In the performance of his duties as shipkeeper of the S. S. Arcturus on January 11, 1959, Nielsen was using the lights of his automobile, apparently for the purpose of inspecting his ship's mooring lines, where they extended beyond the mooring dock, as found by the Deputy Commissioner. (Pet. App. 4, 5.)

For some unexplained reason, not established by any evidence, it happened that—the automobile went over and off the end of the dock, alongside the ship, and struck upside down on the ice and waters below the dock.

From that impact, of the top of the automobile on the ice, the Deputy Commissioner found as a fact, that Nielsen sustained injury, in the form of skull fractures and brain damage, which caused his death. (Pet. App. 5.)

There was no evidence in the record before the Deputy Commissioner and no factual finding by him that Nielsen had suffered any injury whatsoever from any accident on the dock. (Pet. App. 2, 3, 4, 5 and 6.)

The Deputy Commissioner therefore, on the basis of his factual finding as to the situs of the fatal injury, and

on the basis of his further finding that the fatal injury occurred while Nielsen was in the performance of his duties as shipkeeper, made an award of death benefits to Nielsen's surviving widow and two minor children. (Pet. App. 7.)

The award thus made by the Deputy Commissioner was reviewed by the District Court under the limited scope of review provided for in the Longshoremen's Act.

For the reason set forth in the opinion of the District Court, the award to the surviving dependents of Nielsen was nullified.

The District Court wrote the rationale for this result as follows:

> "The Deputy Commissioner found that Carl Nielsen's death resulted from an injury occurring upon the navigable waters of the United States * * * (Pet. App. p. 11.)
>
> "In a compensation case where we are not concerned with a breach of duty, I think the test must be that if the impetus which put in motion the sequence of events resulting in the fatal accident came from land, and operated on the person injured while on land, then there can be no jurisdiction and no valid award. (Pet. App. p. 14.)
>
> "Being mindful of the broad purposes of the Act, and the liberal construction to be given its provisions, together with the weight residing in the Deputy Commissioner's findings of fact, it is my considered judgment that assuming facts as found by the Commissioner to be true, they do not support the legal conclusion that Carl Nielsen's fatal injury occurred upon navigable waters of the United States. Carl Nielsen drove off the dock and crushed his skull on the ice below. Whatever the reason that caused him to drive off the dock* the occurrence or the condition that initiated and brought about the fatal accident oc-

curred on the dock. Since this was not an injury occurring upon navigable waters, the Commissioner was without jurisdiction to make the award." (Pet. App. p. 15.)

Thus we have the theory relied upon by the District Court, for what we assuredly say was a "harsh and incongruous result," to use the words of this Court.

The statutory presumption of coverage, which Congress wrote into the Act itself, was ignored.

The broad powers given to the Deputy Commissioner under the Act were fluffed off with a casual reference thereto in the opinion.

The liberal construction to be given to the Act and the repeated mandates of this Court, that the objectives of this humanitarian legislation were to be of prime consideration —all were ignored, in favor of abstractions about "impetus," "sequence of events," "starting on the dock," etc., in a record wholly devoid of any evidence of "blows," or "trauma," or "injury," or "accident" on the dock.

The limited scope of review permitted the District Court was completely disregarded. 33 U. S. C. § 922(b).

This Court by clear mandate, has more than once directed that awards of compensation must be upheld if the Deputy Commissioner's choice of inferences has substantial roots in the evidence and is not forbidden by law.

O'Leary vs. Brown-Pacific-Maxon, 340 U. S. 504 (1951);

Voris vs. Eikel, 346 U. S. 328, 333 (1953);

Cardillo vs. Liberty Mut. Ins. Co., 330 U. S. 469, 477-479 (1947).

This, too, was disregarded by the District Court.

On appeal to the Circuit Court of Appeals for the Sixth Circuit, the nullification made by the District Court was reversed and an order made to reinstate the award of death benefits to the surviving dependents of Carl Nielsen, deceased. (Pet. App. 24.)

Chief Judge Weick and Senior Circuit Judge E. Barrett Prettyman of the District of Columbia heard the case. A clear, perceptive and convincing opinion was written by Circuit Judge Edwards for a unanimous court, in complete refutation of the fallacies relied upon by the District Court. (Pet. App. p. 17-25.)

One other tangential subject requires some discussion under this heading of our statement of the case.

We find it necessary, by reason of the statements made at page 3 of the petitioner's petition, wherein the alleged availability of compensation to Nielsen's surviving dependents under the Ohio Workmen's Compensation Act is suggested, to answer the same.

Petitioner must know, as the employer of Carl Nielsen, that at no time was a claim for state compensation filed by his widow and at no time was any state compensation paid to her.

What is even more important, petitioner as the employer must also know, that the widow's failure to file any claim for state compensation within two years of the decedent's death viz on or before January 11, 1961, caused the claim to be time barred, as to any rights she may have had thereto, under Section 4123.84 of the Revised Code of Ohio.

We are willing to believe that this was an inadvertence on the part of petitioner, but we cannot let this Court have the possible impression that any state compensation is still available to the widow and her children.

The irony of the foregoing however is, that The Interlake Steamship Company, as employer, *did* set up the one year statute of limitation, as a defense against this respondent's claim, in this proceedings under the Longshoremen's Act. (Pet. App. 5, 6.)

It happened however that the vessel owner employer here—wittingly or unwittingly—did not file the statutory ten day notice of the fatal accident to Nielsen, which it was bound to do under penalty under the Longshoremen's Act. This failure—fortunately for the widow—had the effect of tolling the one year statute and preserving her rights under the Longshoremen's Act, since the Deputy Commissioner found that the employer had knowledge of the fatal injury and had not been prejudiced for want of notice. (Pet. App. 6; 33 U. S. C. 930(a)(e).)

It is of no moment here that these defaults by the widow were the result of her ignorance as to where, how and when to make claim for compensation and to the inexperience of the first legal adviser upon whom she relied for advice.

What *is* of moment however is, that the maze of legalisms which surround the right to workmen's compensation, where there are overlapping jurisdictions will continue to plague judges, lawyers, and claimants alike, if the particular claim happens to fall within the twilight area.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI.

I.

The Decision of the Circuit Court of Appeals Presents a Statement of Sound Law That Is Applicable to the Unique and Undisputed Facts Here Present and No Special or Important Reasons Exist for Review on Certiorari.

The uniqueness of the factual situation, as to the place and cause of Nielsen's fatal injury, and the undisputed character thereof have already been fully stated to the Court.

It is important however to remember that the multitude of the *dock side* injury cases, to be found in the reported decisions, and the multifarious ones where there was injury on the dock *and* in the water, have no relevancy here.

It is basic in the question presented to the Court that there was no accident involving any injury to Nielsen on the dock and that the *first* injury suffered by him occurred when the top of his car crushed his head from its impact on ice in the waters below the dock. In a word, the fatal injury here occurred within the literal language of the Longshoremen's Act as to situs.

This is hardly therefore the kind of case on its facts, which would require that the energies of the Court should be engaged in its resolution, on a writ for certiorari.

The irrelevant abstractions, relied upon by the District Court, as the ground for nullifying the award of the Deputy Commissioner, have been quite adequately dealt with in the opinion of the Court of Appeals.

Admiralty jurisdiction has historically depended on the place of the consummation of a maritime tort.

If on water, maritime jurisdiction existed, even though the breach of duty causing injury or damage originated on land.

Smith vs. Lampe, 64 F. 2d 201 (1933), cert. denied 289 U. S. 751;

Weinstein vs. Eastern Air Lines, 316 F. 2d 758 (3 CCA 1962—cert. denied 375 U. S. 940).

If on land, jurisdiction did not exist, i.e. *prior* to 1948, when Congress enacted the Admiralty Extension Act. 46 U. S. C. 740.

Since 1948, admiralty jurisdiction does exist, if the force or breach of duty causing the injury, started on navigable water and was consummated on land.

This simple statement of the basic principles of maritime jurisdiction, as it now exists, seems to us clear and settled beyond debate.

We are not so sure as to the attitude of petitioner thereon, in the light of its stubborn insistence on the application of old decisions which ceased to have any relevancy or vitality, after the passage of the Extension Act.

We will not unduly extend this brief therefore with a case by case analysis of the decisions cited in the petition for certiorari.

We did so in our brief before the Court of Appeals and that Court has stated the reasons why they have no application to the facts in this case.

Our answer thereto here can be limited to the enlightened statement thereon of Judge Brown in the case of *Pure Oil Company vs. Snipes*, 293 F. 2d 60 (5 CCA—1961).

The question at issue was, whether the maritime law or the law of Louisiana determined jurisdiction, with respect to the personal injury claim of a worker known as a

roughneck, who fell from a drilling platform, affixed to the ocean floor in the Gulf of Mexico, into the sea, first however striking the deck of the platform and then two girders in the course of his fall.

Judge Brown wrote as follows:

"At most, we have a question whether Congress may treat an occurrence in this new geographical area as substantially maritime even though on traditional lines an event taking place on a structure fixed permanently to the bed of the water might be regarded as non-maritime. For that matter, even in the development of that decisional law, the course was never fixed and there were frequent conceptual deviations. Thus, while damage by vessels to a pier was non-maritime, Plymouth (1866), 70 U. S. 20, damage to a beacon or similar structure maintained primarily as an aid to navigation, was maritime. Blackheath (1904), 195 U. S. 361; Raithmoor (1916), 241 U. S. 166. After considerable difference of opinion in the lower courts, the Supreme Court finally held in Admiral Peoples (1935), 295 U. S. 649, 1935 A. M. C. 875, that injuries received on the dock as a result of falling from a defective ship's gangway were maritime: In T. Smith & Son, Inc. vs. Taylor (1928), 276 U. S. 179, 1928 A. M. C. 447, a longshoreman standing on the wharf projecting a few feet over the water was struck by a sling load of cargo and was knocked into the water where he was some time later found dead. The Court held that occurrence was subject to the local law, not maritime. In contrast, in L'Hota vs. Crowell (5 Cir., 1931), 1932 A. M. C. 27, 54 F. (2d) 212, we held that a longshoreman working ashore who violently hit the side of the vessel while riding the ship's tackle and thereupon fell to the wharf sustained maritime injuries. In Minnie vs. Port Huron Terminal Co. (1935), 295 U. S. 647, 1935 A. M. C. 879, the longshoreman on the deck of the vessel was struck by a swinging hoist precipitating

him to the wharf. These injuries were held to be maritime. *Many of these refined distinctions are now of historic and academic interest only since Congress cut through many of them by the 1948 Act which extends admiralty and maritime jurisdiction to 'all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.'* 46 U. S. Code, sec. 740. *Its constitutionality has been upheld. United States vs. Matson Nav. Co.* (9 Cir., 1953) 1953 A. M. C. 272, 201 F. (2d) 610." (Emphasis added.)

See also *Benedict* on *The Law of Admiralty,* Volume 1, Section 128, 1964 Pocket Supplement.

II.

The Reasons Urged by Petitioner For Granting Certiorari Are Misconceived and Without Merit.

1.

Admiralty Jurisdiction.

Starting at page 9 of the petition, petitioner argues that the decision of the Court of Appeals brings uncertainty to the one area of admiralty law that has always had a clear and certain meaning.

This must, we believe, be a tongue in cheek assertion and not too seriously made.

We say in reply that, on the contrary, it was the decision of the District Court here which brought doubt and uncertainty into an area of maritime law that was, prior thereto, clear and certain beyond the shadow of a doubt.

The efforts of this Court, to achieve harmony and uniformity in the overlapping areas of state and federal compensation cases, were made manifest in the twilight zone doctrine of the *Davis* case. 317 U. S. 249 (1942).

The most recent effort of this Court to accomplish the same results, was the decision in the *Calbeck* case, to the effect that the availability of state compensation was no longer a defense against a valid claim under the Longshoremen's Act. 370 U. S. 114 (1962).

The new and novel legal fiction found in the decision of the District Court here will, we respectfully suggest, call for no action by this Court, in the light of the decision thereon, of the Court of Appeals for the Sixth Circuit, by which it was reversed and the reasons given by that Court for its reversal.

2.

Cases Relied Upon By Petitioner.

We have already discussed the decisions, cited by petitioner on pages 11, 12 and 13 of the petition, and have attempted to show that they furnish no grounds for reviewing the decision of the Court of Appeals on the particular facts of this case.

3.

Petitioner's Criticism of the Court of Appeals' Decision.

Petitioner asserts at page 14 of the petition that the three reasons assigned by the Court of Appeals for its decision reveal misapprehension.

The first criticism is directed to what the Court of Appeals said about the expanding boundaries of maritime law.

We are told by petitioner that the lower Court mistook the particular text which it found in *Gilmore and Black's* treatise on *The Law of Admiralty* (1957).

Petitioner apparently overlooked the statement in this treatise which we brought to the attention of the Court of Appeals in our brief in that Court.

Professors Gilmore and Black concluded their chapter on "The Interrelationship of the Longshoremen's Act and State Compensation Statutes" with the following very illuminating summation, found at page 353:

> "It is to be hoped that when the Supreme Court gets around to clarifying the theory of the twilight zone, it will firmly discourage such subtleties and complexities. The purpose behind the invention of the twilight zone was apparently *to provide injured maritime workers with an easy and above all a certain remedy, at whatever cost of 'theoretic illogic.'* If the courts yield to the temptation, usually irresistible to any lawyer, of trying to make a kind of formal sense of the twilight zone, the result will be worse than 'maritime but local.' *The only thing to do, as the Massachusetts court suggested in Moores, is 'not to attempt to reason the matter through' but merely to apply the theory in whatever way may be necessary to see that the injured claimant does not lose his remedy in a maze of legalisms.*" (Emphasis ours.)

This was written in 1957 and therefore before the *Calbeck* decision of this Court *supra*. *Calbeck* has made true the prediction here made.

What is of prime importance in respect of the Nielsen claim is the final statement of the Gilmore and Black treatise which we have emphasized above, namely, that the prime duty of the courts, if justice is to be achieved, is to apply the theory in whatever way it must be done, and see to it that an injured claimant does not lose his remedy in a maze of legalisms.

The Deputy Commissioner and the Court of Appeals produced that very just result in this case for Nielsen's widow and children. The review sought herein on certiorari should, for this reason, as well as the others mentioned herein, fail.

Petitioner tells us that the Court of Appeals cited no decision in support of its statements as to the expanding boundaries of admiralty law.

In the brief filed by us in the Court of Appeals, we quoted at length from the recent decision of Circuit Judge Boreman, in the case of *Scott vs. Isbrandsten,* 327 Fed. 2d 113, 123 (4 CCA—January 1964). While Judge Boreman's opinion was not mentioned in the Court of Appeals decision, we again quote therefrom in part as follows:

> "The radical reconstruction of maritime personal injury law since 1940 has made much of the older case law of little more than antiquarian interest.
>
> "The volume of personal injury litigation since 1945, and particularly since 1950, has been so great that exhaustive citation of recent lower court cases would be an almost impossible task. These cases were decided against a rapidly changing background and many of them were of merely transitory interest; since the Supreme Court has claimed the field of maritime personal injury litigation as its own, lower court decisions have suffered from rapid technological obsolescence. Thus exhaustive citation to them would be fruitless and unhelpful. * * *"

CONCLUSION.

Respondent Marcella R. Nielsen respectfully submits that the petition of The Interlake Steamship Company for a writ of certiorari be denied upon the grounds that the judgment of the Court of Appeals for the Sixth Circuit was right and that no special and important reasons have been presented for granting the writ.

Respectfully submitted,

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